88-346

Supreme Court, U.S.
FILED
AUG 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ANTHONY MINIZZA, *et al.*,
Petitioners,

v.

STONE CONTAINER CORP. CORRUGATED CONTAINER DIV. EAST PLANT, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

In lieu of a wage increase, the collective bargaining agreements at issue in this case provided for two bonus payments. With a minor exception, to be eligible for the first payment, employees had to be active employees on the effective date of the agreement and three months prior thereto; to be eligible for the second payment, employees had to be active employees a year after the effective date of the agreement and six months prior thereto. The court of appeals held that the amount of the bonus payments need not be included in the "regular rate" of compensation in calculating the overtime payments due employees under § 7 of the Fair Labor Standards Act, because the payments are not "compensation for hours of . . . employment" under § 7(e)(2) of the Act. The questions presented are:

(a) Does the "regular rate" of compensation for purposes of calculating overtime payments under the Fair Labor Standards Act include payments to employees as compensation for services rendered, where the amount of compensation does not depend upon the precise number of hours worked or services rendered?

(b) Are lump sum payments, such as the ones in this case, negotiated in lieu of wage increases "compensation for hours of employment", to be included in the "regular rate" of compensation for purposes of calculating overtime payments under the Fair Labor Standards Act? *

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* The appellants in the court of appeals, now respondents in this Court, were Stone Container Corp., Corrugated Container Division, East Plant, Stone Container Corp., Corrugated Container Division, West Plant, Chesapeake Corrugated Co., and Owens-Illinois, Inc. The appellees in the court below, petitioners in this Court, were several hundred individuals; because of their large number, their names appear in Appendix E to this *certiorari* petition.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Anthony Minizza *et al.*, petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the decision and judgment in *Minizza v. Stone Container Corp., Corrugated Container Div. East Plant*, 842 F.2d 1456 (3d Cir. No. 87-1348; March 28, 1988).

OPINIONS BELOW

The opinion of the court of appeals is reported at 842 F.2d 1456 and is reprinted in the appendix to this petition at 1a-22a ("Pet. App."). The order of the court of appeal denying rehearing and rehearing *en banc* is unreported and is reprinted at Pet. App. 36a. The opinion after a non-jury trial of the District Court for the East-

ern District of Pennsylvania is reported at 660 F. Supp. 404 and is reprinted at Pet. App. 23a-35a.

JURISDICTION

The court of appeals' order denying rehearing was entered on April 26, 1988. On July 20, 1988, the time for filing a petition for writ of certiorari was extended by Mr. Justice White until August 24, 1988. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are reprinted at Pet. App. 46a-48a.

STATEMENT OF THE CASE

The Underlying Facts

Plaintiffs in this case are several hundred employees who are or were employed by one of the defendant companies (all referred to collectively as "the Employers"), and who are or were represented for purposes of collective bargaining with their employer by United Paperworkers International Union Local 375 ("the Union").[1]

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[1] One of the employer defendants, Stone Container Corporation, negotiated separately with the Union for one of its two plants (Stone Container Corporation West Plant) involved in this lawsuit. Stone Container Corporation East and the other employer defendants negotiated with the Union as part of a multiemployer bargaining unit, the Philadelphia Container Association. The Stone West negotiations took place after the Association bargaining was completed; Stone West was represented in bargaining by the same individuals who had represented Stone East, and the agreements reached in the two sets of negotiations were, for present purposes, identical. While, for simplicity sake, we discuss in the text the Association negotiations only, the course of events, and the resulting agreement, at Stone West were for all relevant purposes factually similar.

Prior to 1984, all labor agreements entered into between the Employers and the Union provided for annual wage increases. In 1984, however, the Employers sought new contracts with no increase in the base hourly wage rates. Pet. App. 25a. The Union, on the other hand, proposed initially a $1.25 per hour wage increase in each year of the contract. R. 90.

In response, the Employers made a proposal novel in the relationship between these parties: Rather than paying employees on an hourly basis throughout the year, the Employers proposed, under the heading "wages", a "one-time lump sum bonus of $250.00 in the second and third years of the contracts, to be paid to employees who worked at least 1,000 hours in the year preceding the bonus eligibility date"; according to that proposal, there would be "no *other* wage or salary adjustments during the life of the agreement." R.94 (emphasis supplied). The reason that the Employers preferred this alternative (and why the practice of providing such lump sum payments has become popular generally) is that such payments, unlike hourly wage increases, do not become part of the wage rate from which bargaining begins at the time of the next negotiations, or of the wage rate used in calculating such benefits as vacation pay, workers' compensation, and contractual (as opposed to statutory) overtime pay. Pet. App. 27a; R. 47-48, 167. As a result, the long term cost to employers of lump sum payments of this kind is substantially less than would be inclusion of an equivalent amount, prorated, in the hourly wage rate.

After the initial bonus proposal there ensued extensive negotiations over the amount, timing, and eligibility requirements for the bonus payments. While the time period for eligibility at some point became expressed in months of active employment rather than in the precise number of hours worked, the requirement of a specified period of service was part of the bonus concept from

beginning to end. Further, as the district court found,[2] the negotiations consistently focussed upon the payments as settling the wage aspect of the agreement:

> Both employer and Union representatives, during the negotiations, discussed the bonuses and recorded such discussions under the subject of wages. Bonuses are also treated under the subject of wages in the contracts themselves, the memoranda of understanding, and the employer negotiation notes. Changes in the bonus amounts during the course of negotiations were made in response to, or in conjunction with, proposals relating to cents-per-hour increases. In discussions between the parties across the table, bonus amounts were translated into cents-per-hour; the employer's negotiating notes show the same calculations made in employer caucuses and minutes. [Pet. App. 26a].

The result of the negotiations (after the rejection on a ratification vote of an earlier proposal, and some changes in the lump sum payment terms) was a Memorandum of Agreement that listed changes not only in "Health and Welfare", "Sickness and Accident Disability Benefits", "Life Insurance, Accidental and Death Benefits", "Pension", and "New Hires" but also in "Wages." The entry under the latter heading was as follows:

> July 1, 1984: $750 bonus to eligible employees;

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[2] The court of appeals did not in terms purport to upset this or any other of the district court's findings as "clearly erroneous" (*Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985)). Pet. App. 6a. The court of appeals did disagree with the district court's characterization of the payments as "compensation for . . . employment" within the meaning of the statute. Pet. App. 10a. While that disagreement may well have been beyond the court of appeals' power under *Anderson v. City of Bessemer* and other cases of this Court, the pertinent point for present purposes is that the court of appeals in no way questioned any of the district court's factual findings as to the actual course of events quoted or relied upon in this section.

> July 1, 1985: $500 bonus to eligible employees and a general increase in base wage rates of $.15 per hour.
>
> July 1, 1986: A general increase in base wage rates of $.50 per hour.
>
> *Eligibility for Bonuses:* For the July 1, 1984 bonuses, the employee must have been an active employee for three months. For the July 1, 1985 bonus, the employee must have been an active employee for six months. If the employee was on the seniority list for the applicable time period prior to the adjustment date but is on sick leave or layoff as of the date, the employee will receive a pro rata bonus when he/she returns to work. [R. 60; *see also* R. 62.]

Thus, "[t]he lump sum bonuses were negotiated in lieu of first and second year wage increases." Pet. App. 26a. While "[t]he lump sum payments were also inducements by the employer to secure the employees' ratification of the contract in the face of minimal wage increases and reductions in medical benefits," this was, according to the trial court's findings, true only in the same sense that "[e]very aspect of a labor agreement is intended to induce ratification and achieve labor peace," Pet. App. 26a-27a. The Memorandum of Agreement was ratified by the employees, and was eventually reflected in the final contract between the parties. R. 45; *see also* R. 75.

Throughout the negotiations, "the implications of the FLSA for the treatment of the lump-sum payments for calculating of overtime. . . . [were] *never* discussed or considered. . . ." (Pet. App. 27a, emphasis added). A few months after the negotiations were completed, however, the Union was advised by its legal counsel that the Fair Labor Standards Act, 29 U.S.C. § 207, requires the inclusion of the negotiated bonuses in calculating the regular rate of pay for purposes of determining the statutory time-and-a-half rate due for hours worked over forty hours in a week.

When the Employers refused to calculate overtime on this basis, the Union contacted the Department of Labor for general guidance regarding the overtime treatment of lump sum bonuses. The Department declined to offer any definitive advice, noting that many different forms of lump sum bonus payments have recently been included in collective bargaining agreements, and that "because the employees involved are collectively represented . . . this is an area in which compliance with the provisions of the Act is best left to the parties to achieve, through litigation or otherwise." R. 36. The Union thereupon instituted the lawsuits that underlie the decision below and this Petition.

Proceedings Below

After trial, the district court concluded that the lump sum payments at issue in this case must be included as part of an employee's "regular rate" in calculating statutory overtime pay:

> The evidence supports the finding that the payments were made in lieu of wage increases. While not tied directly to hours worked, the correlation in the eligibility provisions between work and bonus receipt supports the conclusion that the bonuses were compensation for employment. . . .
>
> Based upon the interpretation of the relevant statute, and the characteristics of the lump sum payments as compensation for hours worked, these sums are to be included in the employee's regular rate of pay for purposes of the statutory overtime calculation. [Pet. App. 29a, 31a].

The court of appeals reversed. That court was of the view that "the fact that the entitlement to these payments was dependent on an employee's having been with the employer for a certain period of time does not support the conclusion that the payments were compensation for employment." Pet. App. 9a. Rather, according to the court of appeals:

> The facts show that these payments were nothing more and nothing less then an inducement by the employers to ratify the agreement on the terms proposed by the employers. The employers obviously not wanting to pay a greater number of employees than they had to in order to achieve ratification, targeted that minimum number of employees necessary to achieve that goal, and therefore structured the eligibility requirements accordingly.[8] *If the payments were made as compensation for hours worked or services provided, the payments would have been conditioned on a certain number of hours worked or on an amount of services provided.*
>
> ---
>
> [8] The selective purpose of the payments is evident in the fact that employees similarly situated except for length of service were treated differently with respect to entitlement to these payments.
>
> [Pet. App. 12a; emphasis supplied.]

Judge Sloviter dissented, relying heavily upon two Department of Labor regulations which demonstrate that a "payment may be 'compensation for hours of employment' even if it is not tied to specific hours worked." App. 19a. Giving deference to the regulations disregarded by the majority, Judge Sloviter concluded that there is "no statutory support for the majority's conclusion that the statute requires exclusion from the 'regular rate of pay' of bonuses bargained for and paid to employees who must have worked a specified period before they could be eligible therefore." Pet. App. 21a. And Judge Sloviter stressed that any contrary view "will open the doors to widespread evasion of the overtime provisions of the Fair Labor Standards Act":

> [T]he Brief for one of the amici notes that it has been reported that "one-third of all non-construction bargaining agreements negotiated in 1986 contain provisions for some form of lump sum payments." Brief of Amicus Curiae Chamber of Commerce at

> 4 . . . If the lump sum payments referred to are, as in this case, substitutes for compensation for services performed, then the era of evasion is already upon us. I find it difficult to believe that Congress envisioned that the bargaining parties could agree to substitute nondiscretionary, collectively bargained bonuses in lieu of wages and thereby decrease the amount of overtime that must be paid to the workers. [Pet. App. 21a-22a].

REASONS FOR GRANTING THE WRIT

In 1984, the Union and the Employers included in their collective bargaining agreements, in lieu of ordinary wage increases in the first two of the three years covered by that agreement, two bonus payments. Pet. App. 26a. As the record in this case, as well as more recently published statistics, establish, the practice of providing lump sum payments in collective bargaining agreements instead of the more traditional hourly or weekly wage increases has become exceedingly common in recent years. In both 1986 and 1987, for example, about one third of all non-construction bargaining agreements in one broad survey contained some form of lump sum payments, up from less than one fifth in 1985. Pet. App. 14a, 21a; R. 45; Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts*, 18:451-32. Moreover, in 1987 seventy percent of agreements with first year wage freezes provided for lump sum payments. *Collective Bargaining Negotiations and Contracts, supra*, at 18:451-52.

The court of appeals held in this case that by following this widespread practice rather than paying employees the same total cash amount on a weekly or hourly basis, employers can significantly decrease the rate of the statutory time-and-a-half overtime pay due employees under § 7 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207: According to the court of appeals, such lump sum payments are not part of an employee's "regular rate at which he is employed" (§ 7(a), 29

U.S.C. § 207(a)), and are therefore not included in calculating the "compensation . . . at a rate not less than one and one-half times the regular rate at which he is employed" due under the statute for each hour worked over forty hours a week.

As the dissent in this case stated, that holding "opens the doors to widespread evasion of the overtime provisions of the Fair Labor Standards Act." Pet. App. 21a. Under the court of appeals' opinion, employers would be able to decrease their overtime costs by the simple expedient of shifting cash recompense for employment from payments pegged directly to hours worked or amount produced to less frequent payments pegged more generally to services rendered. The result would be to encourage employers to work employees longer hours; to limit the compensation employees receive for the inconveniences and wear and tear of overtime work; and to discourage, rather than encourage, the spreading of work among more employees.

All of these results are squarely contrary to the FLSA's purposes as elaborated in this Court's opinions. Not surprisingly then the court of appeals' decision in this case is squarely contrary to the language and structure of the overtime provisions of the FLSA, as well as to the Department of Labor interpretation of those provisions.

In particular, the decision below is inconsistent with (1) the plain language of the FLSA; (2) this Court's directives concerning the role of the Department of Labor in the interpretation of the FLSA; (3) the purpose of the overtime provisions of the Act, as delineated in several opinions of this Court, and (4) the principle reiterated by this Court that the words or format used by the parties to a collective bargaining agreement cannot be allowed to defeat those purposes.

Further, the court of appeals relied upon a rationale that, if allowed to stand, could sanction widespread confusion about, and evasion of, the overtime pay provisions of the FLSA with regard not only to lump sum pay-

ments in lieu of wages, increasingly popular in collective bargaining agreements, but also to many other kinds of payments to employees that are not directly pegged to the amount of hours worked or services provided.

In sum, the decision below is not simply wrong it is indefensible. And that decision does not simply create isolated mischief, it threatens the very basis of the most basic of the federal labor standards provisions. This Court's plenary review is urgently needed.

1. Section § 7(a) of the FLSA, 29 U.S.C. § 207(a), provides that "no employer shall employ . . . his employees . . . for a workweek longer than forty hours unless such employees receives compensation for his employment [over forty hours] at a rate not less than one and one-half times the regular rate at which he is employed." Section 7(e), 29 U.S.C. § 207(e), in turn provides that the "regular rate" includes "all remuneration for employment paid to, or on behalf of, the employee", except seven enumerated categories of payments.[3] The court of appeals regarded the payments in this case as outside the "regular rate" for purposes of calculating overtime amounts because exempt under § 7(e)(2) as a

> payment[] made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payment[] for

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[3] Section 7(e) was added to the FLSA in 1949. Prior to that, there was no definition of "regular rate" in the statute. The intent of the 1949 amendments was not to alter the previous statutory purpose or application, but rather to

> remove, so far as possible, any uncertainty as to meaning, and to provide explicit guidance for affected employers and employees and for the officials charged with the duty of administering the law. With this end in view, the bill defines and delimits in some detail the payments to employees which the committee believes should be excluded in computing the regular rate of pay, and makes it clear that all other remuneration for employment should be included in calculating this rate. [H. Rep. No. 267, 81st Cong., 1st Sess. p. 6 (1949).]

> traveling expenses, or other expenses, incurred by an employer in the furtherance of his employer's interests and properly reimbursable by the employer; [or] *other similar payment*[] *to an employee . . . not made as compensation for his hours of employment.* [Emphasis supplied.] [4]

As read by the court of appeals, the italicized phrase in § 7(e)(2) exempts from the "regular rate" for overtime purposes any payments made by an employer to an employee not measured by a *precise* number of hours or amount of service. This is so, according to the court of appeals, even where, as here, there is a requirement that a stated level of service as an employee be rendered to be eligible for payment, and even where, as here, *the parties regarded the payments as a direct cash substitute for periodic cash payments* in recognition of incremental amounts of work performed, *viz.* as a substitute for wages in the traditional sense.[5]

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[4] The part of § 7(e) that most naturally governs payments of the kind here at issue is § 7(e)(3)(a). That section exempts from the "regular rate"

> [s]ums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly. . . .

As the court of appeals recognized, however, the payments here at issue plainly do not fall within that section. Pet. App. 13a. The reason is that the payments were *not, either* as to fact of payment or amount, "determined at the sole discretion of the employer." Rather, the payments were established by contract. As the Department of Labor's interpretive regulations therefore state, "any bonus which is . . . the result of collective bargaining would not be excluded from the regular rate under this provision of the Act." 20 C.F.R. § 778.211. *See also* Department of Labor Opinion Letter, October 15, 1981 (R. 26).

[5] The court of appeals regarded this latter fact as of little relevance because

> [a]ll remuneration by an employer comes at the expense of wage increases. Employers have a finite amount to spend for

The FLSA, however, establishes *no* such requirement. Rather, the general statutory definition of "regular rate" contained in § 7(e) includes "*all* remuneration for employment." And the court of apepals recognized, in the sense of giving lip service to, the principle that any exception to this "all inclusive rule" must be "narrowly construed . . . *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295-96 (1959) . . . and the employer bears the burden of establishing the exemption. *Idaho Sheet Metal Workers, Inc. v. Writz*, 383 U.S. 190, 209 (1966)." Pet. App. 7a.

Thus, the point of the Act is that as long as a payment flows from the employment relationship and is in some sense a recognition for services performed, it is "remuneration for employment," however that payment is calculated unless one of the § 7(e)'s express exceptions "narrowly construed" applies. And the evident intent of the exception contained in § 7(e)(2) is to exempt payments that are compensation for something *other than*

> the labor component of their product or service. This sum can be allocated solely as compensation on a hourly basis. . . or it can assume any number of other forms, including insurance or medical benefits, paid vacation, etc. . . . Therefore, to state as the district court did that the payments at issue were made in lieu of wage increases is true, but that does not necessarily preclude their falling within the language of the exclusions contained in section 207(e), since certain wage substitutes are excluded under this section. [Pet. App. 8a.]

These payments, however, are wage substitutes not only in the sense that the payments are from an employer's viewpoint an aspect of the "labor component" of the business but also in that, *unlike* fringe benefits such as medical benefits or pensions or vacations, such payments are economically interchangeable with wages from an *employee's viewpoint* as well. That is, such payments, because they are unencumbered cash to be used in any way an employee sees fit, serve precisely the same economic function for the employee as ordinary wages—*vis.*, paying such expenses as the employee chooses to incur--and, unlike other payments such as holiday or vacation pay, they provide no other benefits than cash—such as time off from work—to the employee.

time spent working (for example, time spent not working, or money avdanced, or equipment supplied to the employer, or the inconvenience of coming to work when no work is available).

Nothing in the section suggests that a payment that *is* in recognition of services performed is *not* "remuneration for employment" in the statutory sense in *all* situations in which the payment is *not measured directly* by the number of hours or amount of services provided. The FLSA, in other words, is *not* based on the theory that to be "compensation for . . . hours of employment", a payment need be calibrated exclusively to the number of hours of employment; the payment can be measured in some other way, and still serve to compensate an individual for time at work.[6]

3. The Department of Labor takes precisely this commonsense view of the statute. According to the Department, the "other similar payments" exception of § 7 (e) (2) covers payments that

> must be 'similar' in character to the payments specifically described in section 7(e)(2). *It is clear that the clause was not intended to permit the exclusion from the regular rate of payments such as bonuses or the furnishing of facilities like board and lodging which, though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services.* [29 C.F.R. § 778.224(a); emphasis supplied.]

Further, according to the Department, several kinds of bonus payments which are not calibrated to particular hours worked, such as "[b]onuses which are announced

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[6] To read the provision otherwise would seem to except, for example, salaries paid regardless of hours worked, length-of-service differentials in salaries, merit increases, shift diffentials, and all manner of other criteria that govern who gets paid what amount other than the number of hours worked or the amount of goods produced.

to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay," 29 C.F.R. § 778.211(c), as long as those bonuses are not so discretionary as to be covered by § 7(e)(3). *See* n. 4, *supra*.[7]

These codified interpretative rulings of the Department of Labor were disregarded by the court of appeals. In so doing that court proceeded in a fashion contrary to this Court's long-established directives concerning the weight to be given to the Department's understanding of the FLSA:

> [T]he Administrator's policies are made in pursuit of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They . . . determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. . . . We consider that the rulings, interpretations and opinions of the Administrator upon this Act, while not concontrolling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such judgment in a particular case will depend upon the

[7] While taking no definitive position regarding any particular bonuses, the Secretary reiterated the general views quoted in the text in the letter written in response to the Union's general inquiry regarding the status of bonuses such as the ones involved in this case. *See* p. 6, *supra*. R. 35. In particular, the Department was of the view that "where an employee must be on the payroll in order to receive a future bonus payment, the payment would be regarded as remuneration for employment which would be included in the regular rate under the Act." R. 36. That description, of course, fits precisely the second-year bonus involved in this case.

> thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those facts which give it power to persuade, if lacking power to control. [*Skidmore v. Swift*, 323 U.S. 134, 139-40 (1944)].

In this instance, the Department's interpretative memoranda are well-supported by the statutory structure and purpose while the court of appeal's contrary view creates several insoluble conceptual problems.

First, on the view taken by the court of appeals, both § 7(e)(1) and § 7(e)(8)(a) would make little sense. Section 7(e)(1) is an exception for *certain* "payments in the nature of gifts": those "made at Christmas time or on other special occasions" *and* "not measured by or dependent on hours worked, production, or efficiency." On the court of appeals reading of § 7(e)(2), the latter limitation in § 7(e)(1) would be entirely redundant, since all payments "not measured by or dependent on hours worked, production, or efficiency" would necessarily be excepted by § 7(e)(2), whether the payments were "made at Christmas or on other special occasions" or not.

Moreover, § 7(e)(3)(a) excepts "[s]ums paid *in recognition of service*" (emphasis supplied), but, again, only under limited circumstances. *See* n. 4, *supra*. Where those circumstances do not apply, it would appear that Congress was of the view that generally "sums paid *in recognition of service*" (emphasis supplied), however those sums are measured, are to be included in "remuneration for employment" and therefore in the "regular rate." Otherwise, there would be little point in using the broad phrase "in recognition of service" in this subsection. On the court of appeals analysis, however, *no* traditional bonuses, including those *promised* as a condition of employment and clearly "in recognition of service", would be included in the regular rate of pay for calculating overtime rates: Such bonuses are not generally calibrated, as are incremental wage payments, to hours worked or goods produced, but rather are by defi-

nition a monetary amount *in addition* to the amounts thus calculated.

Further, the Department's view, and not that taken by the court of appeals, is the one that comports with this Court's analyses of the purposes served by the overtime provisions of the Act. Those purposes "were to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment by inducing employers to shorten hours because of the pressure of extra cost." *Bay Ridge Operating Co. v. Aaron*, 344 U.S. 446, 460 (1948). This Court has therefore always insisted "that mere words in a contract can[not] fix the regular rate," (*id.*, at 462), nor is the regular rate determined by "an arbitrary label chosen by the parties." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945). Rather, if employees are to be *additionally* compensated, at a time-and-one-half rate, for extra work, and if employers are to that extent to feel the pressure of *extra* cost above that paid without overtime, " 'regular rate' [must] obviously mean the hourly rate *actually paid* for the normal, non-overtime workweek." *Walling v. Helmerich & Payne*, 323 U.S. 37, 40 (1944). Thus,

> [o]nce the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts. [*Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. at 424].[8]

The very point of determining the "regular rate" as an "actual fact" (*149 Madison Ave. Corp. v. Asselta*, 331

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[8] Although this Court's cases concerning the "regular rate" for overtime purposes were decided before § 7(e) was enacted in 1949, that provision was intended for the most part to codify rather than to overrule judicial interpretations. *See*, n.3, *supra*. The Secretary and the courts have therefore continued to apply the same concepts articulated in the cases cited in the text. 29 U.S.C. § 778.108; *e.g. Brennan v. Valley Towing Co., Inc.*, 515 F.2d 100, 105 (1975).

U.S. 199, 204 (1947)) is to preclude the situation in which the "regular rate" is dependent on the particular way in which an employer arrives at the amount of money paid to a particular employee for his services, since the mode of calculation is both irrelevant to the statutory purposes and open to manipulation.

For example, if an employer pays a weekly salary to an employee regardless how many hours he or she worked or how much he or she produced (as many employers do), the salary is obviously "compensation for hours of employment," not excludable from the "regular rate". *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 (1942); *Highlander v. K.F.C. National Management Co.*, 805 F.2d 644, 647-48 (6th Cir. 1986). The result is the same where compensation is paid quarterly or annually rather than weekly.[9] Thus, to read § 7(e)(2), as did the court of appeal, as permitting employers to artifically decrease the overtime rate by providing compensation that is not precisely calibrated according to the hours worked or the amount produced but according to some more general measure of services rendered is fundamentally to undermine the FLSA's overtime provisions as construed by this Court.

In this instance, the bonus payments were considered by the parties as functionally equivalent to the wage component of the agreement; were paid only to employees with stated durations of active service; and, as to the second year bonuses, were available only to employees who were at work a year after the effective date of the agreement. As such, the payments were in no way exter-

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[9] The Second Circuit forty years ago explained why this is so:

> [T]he relationship between bonus and work is the same as that between weekly wages and work. Each is the consideration in whole or part for the other . . . The creation of a . . . bonus system . . . is an incentive to continuity and length of service and thus follows the normal objectives of both labor, and management. [*Walling* v. *Garlock Packing Co.*, 159 F.2d 44, 46 (2d Cir. 1947)].

nal to the employment relationship, but were cash compensation for employment. Under the Department's interpretation of the statute in its promulgated interpretive regulations, these payments are therefore part of the "regular rate" used in calculating overtime payments.

4. The reasoning of the court of appeals to the contrary depends on two interrelated principles for characterizing the bonus payments as something other than compensation for employment. Each principle fundamentally misconceives the proper inquiry under the FLSA and, if allowed to stand, leads to the exclusion of many kinds of payments to employees that have long been regarded as part of the "regular rate" for FLSA purposes.

The first principle is that the durational eligibility requirements do not demonstrate that the payments are compensation for employment if the employers' *motive* in imposing those requirements is to hold costs down. Pet. App. 9a. But employers are, of course, always motivated by a desire to keep costs down. That the decision to limit the availability of compensation was cost-driven must be viewed as irrelevant to the question whether the course of action actually chosen provides compensation linked to employment or employee status; otherwise the FLSA overtime provisions become all but meaningless.[10]

The second rationale provided by the court of appeals for concluding that the payments in question were not compensation for employment similarly confuses the em-

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[10] For example, in this instance, having decided to limit the bonus payments for reasons of cost containment, the Employers could have made the payments on a first-come, first-served basis, or on the basis of employees' last names, etc. Thus, the cost-containment rationale is an inadequate explanation for the choice of eligibility requirements. That the employers chose to base payment upon durational employment and presence at work on certain days criteria indicates that the employer was interested in rewarding employment-related services, and not simply in arbitrarily cutting costs.

ployer's motives for agreeing to a certain payment to employees with the statutory characterization of that payment. In the court of appeal's view, where the employer agreed to the payments in order to assure ratification of the agreement, the payments are not compensation for hours of employment and are excludable under § 7(e)(2) of the Act. Pet. App. 12a.

As the district court pointed out, employers who bargain collectively with unions whose members ratify agreements by majority vote must necessarily take into account which changes are likely to encourage ratification and which are not. Again, such strategic considerations in structuring compensation, as well as in structuring other aspects of the agreement, must be considered irrelevant in determining which contractual provisions are compensation for employment and which are not, or the FLSA overtime provisions become inoperative in the collective bargaining context.

For example, an employer may believe that long-term employees are more influential in the bargaining unit in convincing others to approve a contract, and for that reason may provide hourly wage increases for them but not for other employees. That the employer had such considerations in mind cannot alter the conclusion that the hourly compensation paid to the long-term employees during the term of the contract *is* part of their compensation for employment, whatever the employer's motive in agreeing to that compensation may have been.[11]

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[11] In propounding the ratification rationale, the court of appeals relied in part upon a 1981 Department of Labor opinion letter that recognized that under some circumstances a lump sum payment made in the content of settling a strike may be excluded from the "regular rate" under § 7(e)(2). Pet. App. 8a. That letter, however, clearly viewed the circumstances of the labor dispute in that instance as unique, and expressly cautioned that "should such payments become a regular practice in settling labor disputes, we would be inclined to view them as an advance of compensation for the period of the new collective bargaining agreement and as such, would appropriately be apportioned into the regular rate of pay." R. 26. *See also* R. 82 (Department of Labor letter dated Augst 25,

Thus, neither the employer's cost considerations nor the employer's strategic considerations concerning the likelihood of contract ratification should have any place in determining as the "actual fact" whether a particular payment to employees is "compensation for hours of employment" or not. The court of appeals decision to the contrary, if permitted to stand, will create substantial uncertainty in the negotiation of collective bargaining agreements: If overtime calculations depend upon an employer's subjective motives in agreeing to one or another element of compensation, the parties to negotiations will have no objective way to calculate the likely cost of any proposals. Moreover, identical provisions in various contracts could be treated differently depending upon the precise course of negotiations leading up to them, or upon later testimony by employers concerning their frame of mind in agreeing to those provisions.

This Court has cautioned:

> [F]reedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. . . . Any other conclusion . . . would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act. [*Walling v. Helmerich & Payne, Inc.*, 323 U.S. at 42].

The court of appeals opinion in this case indubitably encourages the exaltation of "ingenuity over reality", by providing a way to shift significant portions of an employee's recompense for non-overtime employment into payments not included in calculating the overtime rate.

Given the burgeoning role of lump sum bonus payments in lieu of wages in collective bargaining agreements, the question whether this practice is indeed an "insidious dis-

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1982, reiterating that caution). As recent statistics suggest (p. 8, *supra*), lump sum "ratification" bonuses have indeed become a "regular practice in settling labor disputes."

regard of the rights protected by the Act" is a critical one in modern labor relations, and merits this Court's attention.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to the United States Court of Appeals of the Third Circuit.

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